

GOLD RESERVE MINING, INC.

IBLA 81-590

Decided April 19, 1982

Appeal from decision of the Alaska State Office, Bureau of Land Management, declaring unpatented placer mining claims abandoned and void. AA-16179, et al.

Affirmed as modified.

1. Evidence: Presumptions--Evidence: Sufficiency

A presumption of regularity supports the official acts of public officers and, absent clear evidence to the contrary, it will be presumed that they have properly discharged their official duties.

2. Mining Claims: Recordation

Where a mining claimant has been excused from the performance of annual assessment work on claims within a unit of the National Park Service, notice of intention to hold claims must be delivered to and received by the proper office of the Bureau of Land Management on or before Dec. 30 of each calendar year in order to be timely filed under the provisions of sec. 314 of the Federal Land Policy and Management Act of 1976. Depositing a document in the mails does not constitute filing.

3. Administrative Authority: Generally--Constitutional Law: Generally--Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment--Mining Claims: Recordation

The Department of the Interior, as an agency of the executive branch of Government, is without jurisdiction to determine whether the mining claim recordation

provisions of the Federal Land Policy and Management Act of 1976 are constitutional.

4. Estoppel

While employees of the Department might be required to either forward or return documents transmitted to the wrong office, no estoppel can arise where the alleged failure to forward or return missent mail was occasioned by the fact that the document was not actually received by the Department.

APPEARANCES: William B. Murray, Esq., Portland, Oregon, for appellant; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Gold Reserve Mining, Inc., appeals from the April 7, 1981, decision of the Alaska state Office, Bureau of Land Management (BLM), which declared 136 placer mining claims (see Appendix) abandoned and void for failure to file with BLM a 1979 affidavit of assessment work or a notice of intention to hold the claims by December 30, 1979, as required by 43 CFR 3833.2-1(b)(2).

The claims were located in 1966, 1967, and 1968 in the Lituya Bay area of Glacier Bay National Monument, a unit of the national park system. The notices of location for these claims were properly filed with the National Park Service (NPS), pursuant to section 8 of the Mining in the Parks Act, 90 Stat. 1342, 1343, 16 U.S.C. § 1907 (1976). No further filings were required under the Mining in the Parks Act, 1/ and, in addition, that Act waived the annual assessment work requirement of 30 U.S.C. § 28 (1976) for a 4-year period while the Department evaluated the claims which had been recorded. See 16 U.S.C. § 1904 (1976).

Almost contemporaneous with the adoption of the Mining in the Parks Act, however, Congress also enacted section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA) (October 21), 43 U.S.C. § 1744 (1976). While the Mining in the Parks Act, by its terms, applied only to claims located within the national park system, FLPMA's provision applied to every outstanding unpatented mining claim wherever located. Moreover, in addition to the timely filing of copies of the location notice of the claims, FLPMA also required an annual filing both in the local office in the state and with

1/ The original regulations to implement the Mining in the Parks Act proposed by the National Park Service required that the claimant file copies of a recorded proof of labor from the date of location of the claim to the present. See proposed 36 CFR 9.5(a)(4), 41 FR 49864 (Nov. 11, 1976). This requirement was changed when the rule was adopted to require merely a statement that annual labor was performed since Sept. 1, 1970. See 36 CFR 9.5(b)(3) (1978), 42 FR 4838 (Jan. 26, 1977).

BLM, of either evidence of assessment work performed or notices of intention to hold. Thus, holders of mining claims recorded under the provisions of the Mining in the Parks Act were also required to record such claims under section 314 of FLPMA and to make annual filings (presumptively of notices of intent to hold the claims as the assessment requirements had been suspended). Since all claims recorded under the Mining in the Parks Act would, of necessity, predate the effective date of FLPMA, the required documents could be filed no later than October 22, 1979.

In order to obviate the need for double filings by claimants whose claims had been recorded under the Mining in the Parks Act, the NPS regulations, adopted in January 1977, provided that timely recordation under the Mining in the Parks Act would constitute compliance with the claim recordation requirements of section 314(b) of FLPMA, 43 U.S.C. § 1744(b) (1976). However, the regulation noted:

[S]ubsequent annual filings of notice must be made under section 314 and implementing regulations with the Superintendent who will provide copies to the Bureau of Land Management. These subsequent filings with the Superintendent will satisfy the requirements of section 314 of mining claims in the National Park System.

36 CFR 9.5(d) (1978).

It is on the question of "annual filings" that certain problems arise. The regulations were clearly premised on an assumption that the initial recordation of the claim triggered the requirement that annual filings be made "each year thereafter," as provided in section 314(a) of FLPMA. In Harvey A. Clifton, 60 IBLA 29 (1981), the Board examined this contention and held that, in fact, it was the initial filing of either evidence of assessment work or a notice of intent to hold which triggered the necessity of making annual filings under section 314(a), and not the mere recordation of the claim. That holding would, perforce of logic, be equally applicable to those claims recorded under the Mining in the Parks Act, since the only requirement for annual filings of such claims is section 314(a) of FLPMA.

Appellant filed a copy of a notice of intention to hold its claims with NPS sometime in 1977 which NPS transmitted to BLM on December 21, 1977. Thus, the initial filing under section 314(a) was clearly completed within calendar year 1977. ^{2/} This being the case, an annual filing was to be no later than December 30, 1978, in addition to an annual filing no later than December 30, 1979. See Harvey A. Clifton, *supra*; James V. Joyce (On Reconsideration), 56 IBLA 327 (1981). No documents were received within either calendar year. Thus, the decision of BLM should have noted that the claims were deemed abandoned and void for failure to file notices of intention to

^{2/} This would be true regardless whether one viewed receipt by NPS as constructive receipt by BLM or whether one relied on the actual date BLM obtained the documents.

hold in either 1978 or 1979. Each failure was independently sufficient to give rise to the statutory presumption of abandonment. Since, however, the decision of the State Office did not advert to the failure to file in 1978, appellant's argument on appeal is totally directed to the question whether it had complied within calendar year 1979. While we will address its arguments, we wish to make it clear that, in any event, the failure to file in 1978, in and of itself, accomplished the statutory abandonment. 3/

In its appeal appellant asserts that it never intended to abandon the claims and that it did indeed mail notice of its intent to hold these claims to NPS in 1979 in reliance upon 43 CFR 3833.2-1(a)(3) (1979), which specified that NPS would forward such filing to BLM. Appellant argues that the BLM decision is harsh and unconstitutional, and it maintains that the Government should be estopped from asserting that appellant filed no notice of intent to hold these claims in 1979.

[1, 2] Initially, appellant asserts that the required notice was mailed to NPS. However, after an exhaustive search, NPS was unable to discover any evidence that the document was, in fact, received. A presumption of regularity attends the official acts of public officers in the proper discharge of their official duties. Bernard S. Storper, 60 IBLA 67 (1981); Lawrence E. Dye, 57 IBLA 360, 363 (1981). It is presumed that administrative officials have properly discharged their duties and not misplaced or lost legally significant documents submitted for filing. John Walter Starks, 55 IBLA 266, 270 (1981). While this presumption may be rebutted by probative evidence to the contrary, Bernard S. Storper, *supra*; Bruce L. Baker, 55 IBLA 55, 57 (1981); L. E. Garrison, 52 IBLA 131, 133 (1981), uncorroborated statements, even in affidavit form, asserting that a document was filed are insufficient to overcome the inference, drawn from the practice of proper handling of legally operative documents, that a missing document was not filed. H. S. Rademacher, 58 IBLA 152, 156, 88 I.D. 873, 875-76 (1981). This Board has held repeatedly that a mining claimant, having chosen the Postal Service as the means of delivery, must accept the responsibility and bear the consequences of untimely delivery or no delivery of his filings. See George Vincent McMahon, 60 IBLA 187, 189 (1981), and cases cited. 4/

Appellant claims to have mailed the required notice to NPS in October 1979. However, the filing provisions of 43 CFR 3833.2-1(b)(1) and 36 CFR 9.5(b), on which appellant relied, were changed on April 5, 1979. 44 FR 20430 (Apr. 5, 1979). Owners of unpatented mining claims were henceforth

3/ Since, as we have held countless times, the statute is self-executing, BLM's tacit acquiescence could not waive the statutory failure to file in 1978. See generally Lynn Keith, 53 IBLA 192, 88 I.D. 369 (1981).

4/ Judge Lewis believes that where the date of receipt and the date of mailing are of critical importance, if the sender mails each individual document by registered mail with return receipt requested, the receipt of mail and the date of mailing is more easily established.

required to file notices of intent to hold the claims with BLM, which would then undertake to notify the NPS. Thus, 43 CFR 3833.2-1(b)(1) states:

Except as provided in paragraph (b)(2) of this section, [where claimants have received permits to do assessment work] the owner of an unpatented mining claim, mill site or tunnel site located within any unit of the National Park System shall file before October 22, 1979, and on or before December 30 of each calendar year after the year of recording (See 36 CFR 9.5), a notice of intention to hold the mining claim, mill site or tunnel site. Such notice shall be in the form prescribed by § 3833.2-3 of this title and shall be filed with the proper BLM office. A copy of each such filing shall be provided to the Superintendent of the appropriate unit by the Bureau of Land Management.

A similar change in 36 CFR 9.5(b) reflected the new requirement of annual filing with BLM. See 44 FR 20426-27 (Apr. 5, 1979). Thus, appellant should have transmitted any filing made after April 5, 1979, to the BLM State Office and not to the relevant NPS superintendent.

[3] Appellant's challenge to the constitutionality of the statute and regulations cannot be sustained. The conclusive presumption of abandonment found in the mining recordation regulations merely reflects the statute. To the extent these regulations have been considered by the courts, they have been upheld. See Topaz Beryllium Co. v. United States, 649 F.2d 775 (10th Cir. 1981); Western Mining Council v. Watt, 643 F.2d 618 (9th Cir. 1981). This Board has no authority to declare a duly promulgated Departmental regulation invalid where, as here, the regulation is consistent with the underlying statutory authority. See Edgar W. Cook, 58 IBLA 358, 361 (1981), and cases cited. In addition, the Department of the Interior, as an agency of the executive branch of the Government, is not the proper forum to decide whether an act of Congress is constitutional. Lynn Keith, *supra* at 198, 88 I.D. at 372.

[4] Finally, in its reply brief, appellant states that the Department of the Interior should be estopped from asserting that mailing of a notice of intention to hold mining claims does not constitute filing. Appellant states: "The National Park Service did not return the letter transmitting the 1979 notice of intention to hold, and had it done so, the Mining Claimant would have filed timely with the BLM." This, of course, begs the question. NPS can find no record of ever having received the document. While this Board has at times recognized the obligation of BLM state offices to forward or return documents transmitted to the wrong office, in a timely manner (see Richard L. Rosenthal, 45 IBLA 146 (1980), such obligation can arise only where the document is, in fact, received. Appellant's contention to the contrary notwithstanding, the regulations provide that filings are accomplished when they are received. 43 CFR 1821.2-2(f). Thus, the mere fact that appellant may have timely mailed the documents does not establish that they were timely filed. There is no discernible basis in this record upon which to support the invocation of estoppel in this case.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Alaska State Office is affirmed as modified.

James L. Burski
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

APPENDIX

<u>BLM Serial No.</u>	<u>Claim Name</u>	<u>Location Date</u>
AA-16179	#1	August 17, 1966
AA-16180	#2	August 17, 1966
AA-16181	#3	August 21, 1966
AA-16182	#4	August 21, 1966
AA-16183	#5	August 21, 1966
AA-16184	#6	August 17, 1966
AA-16185	#7	August 17, 1966
AA-16186	#8	August 17, 1966
AA-16187	#9	August 17, 1966
AA-16188	#10	August 21, 1966
AA-16189	#11	August 11, 1966
AA-16190	#12	August 21, 1966
AA-16191	#13	August 21, 1966
AA-16192	#14	August 21, 1966
AA-16193	#15	August 21, 1966
AA-16194	#16	August 21, 1966
AA-16195	#17	August 21, 1966
AA-16196	#18	August 21, 1966
AA-16197	#19	August 21, 1966
AA-16198	#20	August 21, 1966
AA-16199	#16A	August 21, 1966
AA-16200	#18A	August 21, 1966
AA-16201	#20A	August 21, 1966
AA-16202	#21	August 21, 1966
AA-16203	#7	August 18, 1966
AA-16204	#7-A	August 18, 1966
AA-16205	#8	August 18, 1966
AA-16206	#8-A	August 18, 1966
AA-16207	#9	August 18, 1966
AA-16208	#9-A	August 18, 1966
AA-16209	#10	August 18, 1966
AA-16210	#10A	August 18, 1966
AA-16211	#46	August 18, 1966
AA-16212	#46A	August 18, 1966
AA-16213	#51	August 18, 1966
AA-16214	#51-A	August 18, 1966
AA-16215	#56A	August 18, 1966
AA-16216	#56	August 18, 1966
AA-16217	#61	August 18, 1966
AA-16218	61-A	August 18, 1966
AA-16219	#66	August 18, 1966
AA-16220	#66A	August 18, 1966
AA-16221	#71	August 18, 1966
AA-16222	#71A	August 18, 1966
AA-16223	#76	August 18, 1966
AA-16224	#76A	August 18, 1966

AA-16225		#81	August 18, 1966
AA-16226		#81A	August 18, 1966
AA-16227		#86	August 18, 1966
AA-16228		#86A	August 18, 1966
AA-16229		#91	August 18, 1966
AA-16230		#91A	August 18, 1966
AA-16231		#1	August 5, 1966
AA-16232		#2	August 5, 1966
AA-16233		#3	August 5, 1966
AA-16234		#3-A	August 5, 1966
AA-16235		#4	August 5, 1966
AA-16236		#4A	August 5, 1966
AA-16237		#5	August 7, 1966
AA-16238		#5A	August 7, 1966
AA-16239		#6	August 7, 1966
AA-16240		#6A	August 7, 1966
AA-16241		#7	August 7, 1966
AA-16242		#7A	August 7, 1966
AA-16243		#2	August 1, 1966
AA-16244	Ass.	#3	August 1, 1966
AA-16245	Ass.	#4	August 1, 1966
AA-16246	Ass.	#5	August 1, 1966
AA-16247	Ass.	#6	August 1, 1966
AA-16248	Ass.	#7	August 1, 1966
AA-16249	Ass.	#8	July 31, 1966
AA-16250	Ass.	#9	July 31, 1966
AA-16251	Ass.	#10	July 31, 1966
AA-16252	Ass.	#12	July 31, 1966
AA-16253	Ass.	#13	July 31, 1966
AA-16254	Ass.	#14	August 3, 1966
AA-16255	Ass.	#15	August 3, 1966
AA-16256	Ass.	#16	August 3, 1966
AA-16257	Ass.	#17	August 3, 1966
AA-16258	Ass.	#18	August 3, 1966
AA-16259	Ass.	#19	August 3, 1966
AA-16260	Ass.	#20	August 3, 1966
AA-16261		#30	August 12, 1966
AA-16262		#33	August 12, 1966
AA-16263		#34	August 15, 1966
AA-16264		#37	August 15, 1966
AA-16265		#38	August 15, 1966
AA-16266		#41	August 15, 1966
AA-16267		#42	August 15, 1966
AA-16268		#45	August 15, 1966
AA-16269		#47	August 15, 1966
AA-16270		#50	August 15, 1966
AA-16271		#52	August 15, 1966
AA-16272		#55	August 15, 1966
AA-16273		#57	August 15, 1966
AA-16274		#60	August 15, 1966

AA-16275	#62	August 12, 1966
AA-16276	#65	August 15, 1966
AA-16277	#67	August 15, 1966
AA-16278	#70	August 15, 1966
AA-16279	#72	August 15, 1966
AA-16280	#75	August 15, 1966
AA-16281	#77	August 15, 1966
AA-16282	#80	August 15, 1966
AA-16283	#82	August 15, 1966
AA-16284	#85	August 12, 1966
AA-16285	#88	August 15, 1966
AA-16286	#90	August 15, 1966
AA-16287	#92	August 15, 1966
AA-16288	95	August 15, 1966
AA-16289	#1	April 28, 1967
AA-16290	2	April 28, 1967
AA-16291	3	April 28, 1967
AA-16292	4	April 28, 1967
AA-16293	5	April 28, 1967
AA-16294	6	April 28, 1967
AA-16295	7	April 28, 1967
AA-16296	8	April 28, 1967
AA-16297	9	April 28, 1967
AA-16298	10	April 28, 1967
AA-16299	11	April 28, 1967
AA-16300	1A	April 27, 1967
AA-16301	2A	April 27, 1967
AA-16302	3A	April 27, 1967
AA-16303	4A	April 27, 1967
AA-16304	5A	April 27, 1967
AA-16305	6A	April 27, 1967
AA-16306	7A	April 27, 1967
AA-16307	8A	April 27, 1967
AA-16308	9A	April 27, 1967
AA-16309	10A	April 27, 1967
AA-16310	11A	April 27, 1967
AA-16311	10B	May 13, 1968
AA-16312	12B	May 13, 1968
AA-16313	14B	May 13, 1968
AA-42265	Ass. #11	July 31, 1966

August 17, 1982

IBLA 81-590	:	AA-16179, <u>et al.</u>
63 IBLA 266	:	
	:	Petition for Reconsideration
GOLD RESERVE MINING, INC.	:	
	:	Petition granted; prior Board
	:	decision modified; State
	:	Office decision affirmed

ORDER

By decision dated April 19, 1982, styled Gold Reserve Mining, Inc., 63 IBLA 266 (1982), this Board affirmed a decision of the Alaska State Office, Bureau of Land Management (BLM), holding that 136 placer mining claims were properly deemed abandoned and void for failure to file an affidavit of assessment work performed or a notice of intent to hold the claims for calendar year 1979 on or before December 30, 1979. In addition, the Board, noting that the case file contained no filing for calendar year 1978, expressly held that the failure to file in 1978 "in and of itself" accomplished the statutory abandonment. Id. at 268-69.

On May 14, 1982, appellant filed a petition seeking reconsideration of the Board's April 19, 1982, decision specifically noting that the Board's statement that no filing had been made in calendar year 1978 was erroneous. This submission also argued that, for various reasons, our decision was in error insofar as it related to deficiencies in calendar year 1979. On June 7, 1982, counsel for the BLM filed an answer. This answer stated, inter alia:

The Board in its Decision, 63 IBLA 268, 269, incorrectly stated that no documents were received in 1978. The fact is, Gold Reserve did file a notice of intention to hold with the NPS in 1978. A copy is attached as Exhibit 1. While a copy of the 1978 notice of intention to hold does not appear in the official BLM case file, the BLM was aware of the filing and consequently did not assert any filing deficiency for 1978 in its Decision. Moreover, as set out in the Board's Decision 63 IBLA at 268, Gold Reserve only had to file with the NPS in 1978. Gold Reserve did do that and it was the NPS' duty to forward the document to the BLM. Gold Reserve's compliance in 1978 is also noted in the

63 IBLA 274A

Answer of the BLM at page 2 where it is said, "[t]he appellant did, however, file notices of intention to hold with the NPS in 1978 and 1980." The BLM thus agrees that the Board's Decision should be modified to delete the incorrect reference to a 1978 filing deficiency.

In light of BLM's declaration we will, of course, grant petitioner's request that we delete all references to any 1978 filing deficiency. However, we must admit that we find BLM's reference to documents relating to recordation which are not in the official cases files disturbing for a number of reasons.

First of all, the official case files are supposed to be the repository of all relevant documents relating to recordation. The Board, no less than the individual mining claimant, has a right to expect that all relevant documents are contained in the files that they are supposed to be in. BLM has not even attempted to explain why they were not placed in the relevant files.

Second, the Board possesses the full de novo review authority of the Secretary in matters relating to the use and disposition of public lands and the mineral resources located thereon. Exxon Co., U.S.A., 15 IBLA 345 (1973). Upon assuming jurisdiction over an appeal the Board has full authority to consider the entire record in making a decision, and its review is not limited to the theories upon which the parties have proceeded. United States v. Gassaway, 43 IBLA 382, 388 (1979). In exercising its de novo authority, the Board must be able to rely on the assumption that the record before it is the full and complete record. Indeed, situations such as the present one arise precisely because BLM has failed to provide the Board with the complete record.

Third, failure to correctly maintain the records can adversely affect an appellant who seeks judicial review of an adverse Board decision since normally such review is limited to the record before the Board when it made its decision. For all these reasons, BLM has an affirmative obligation to both maintain the completeness of its records and to transmit the entire record when an appeal is filed from one of its decisions.

Insofar as the other arguments presented in appellant's petition are concerned, they represent an attempt to relitigate the precise issues addressed in our original decision. Nothing petitioner has submitted affords any basis upon which to change our decision relating to the failure to file for calendar year 1979.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for reconsideration is granted, our decision reported at 63 IBLA 266 is hereby modified to delete any references to a failure to file documents in calendar year

1978, and, as modified, is reaffirmed as to the failure to file in calendar year 1979.

James L. Burski
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

APPEARANCES:

William B. Murray, Esq.
505 Title & Trust Bldg.
321 Fourth Avenue, SW.
Portland, OR 97204

Dennis J. Hopewell
Office of the Regional Solicitor
U.S. Department of the Interior
510 L Street, Suite 100
Anchorage, AK 99501

